No. 80-1210

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAT BURLINSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioners, landowners and tenants whose land in Dunklin County, Missouri allegedly was damaged by "backwaters" or "man-made" flood waters, brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (Pet. App. A-6 to A-7). In their amended complaint, petitioners alleged that the flood was caused by the Army Corps of Engineers' negligent design and construction of a road and drain (Pet. App. A-7). The United States moved to dismiss the suit under 28 U.S.C. 2680(a), the discretionary function exception to the Federal Tort Claims Act, and Section 3 of the Flood Control Act of 1928, 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *" (Pet. App. A-2). The district court granted the motion, finding that the alleged negligent acts fell within the discretionary function exception.

The court of appeals affirmed. The court found it unnecessary to decide the discretionary function exemption question, holding instead that 33 U.S.C. 702c immunizes the United States against liability in the circumstances presented here (Pet. App. A-1 to A-5).

2. The court of appeals' decision is correct and does not conflict with any decision of this Court or another circuit. Therefore, further review is unwarranted.

33 U.S.C. 702c, on its face, creates an unqualified immunity: the United States is exempt from "liability of any kind * * * for any damage from or by floods or flood waters at any place * * *." In enacting this statute, Congress "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954). Therefore, inasmuch as petitioners' losses were allegedly caused by flood waters that arose in connection with a flood control project,[1] the court of appeals was plainly correct in looking to the clear language of Section 702c to hold the United States immune from liability.

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[1]The court of appeals correctly held that "[d]espite [petitioners'] assertions to the contrary in their brief, there can be no serious question that the alleged negligent acts of the Army Corps of Engineers were *committed in connection with a federal flood control project*. We have no doubt that the design, construction and maintenance of the access road should be considered to be part of the flood control project. The complaint * * * refers to drainage districts, a floodway and a pumping station that are clearly part of federal flood control efforts" (Pet. App. A-3 to A-4; emphasis in original). Although petitioners assert in passing (Pet. 4) that "there is a serious question whether the alleged negligent acts of the Corps were committed in connection with a 'flood control project,'" the only issue they ask this Court to review is whether "back waters" or "man-made" flood waters are floods within the meaning of Section 702c (*id.* at 2).

Petitioners nevertheless contend that Section 702c does not immunize the government from liability for flood waters caused by negligence, but instead only comes into play where "climactic conditions" caused the flood (Pet. 4-5). However, every court of appeals to consider this argument has rejected it. See, *e.g.*, *Aetna Ins. Co.* v. *United States*, 628 F. 2d 1201, 1204 (9th Cir. 1980), petitions for cert. pending, Nos. 80-1137, 80-1145 and 80-1178; *Florida East Coast Ry.* v. *United States*, 519 F. 2d 1184, 1191 (5th Cir. 1975); *Parks* v. *United States*, 370 F. 2d 92, 93 (2d Cir. 1966); *Stover* v. *United States*, 332 F. 2d 204, 206 (9th Cir.), cert. denied, 379 U.S. 922 (1964).[2] These decisions make obvious sense. As the court of appeals recognized (Pet. App. A-4 to A-5), "[w]hen Congress enacted the broad-based immunity of section 702c, it could not have intended that the government be required to prove, in each and every case, that the damage was caused by 'natural' rather than 'man-made' flooding." And as the Ninth Circuit recently

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[2]Petitioners' reliance on dictum in *Valley Cattle Co.* v. *United States*, 258 F. Supp. 12 (D. Hawaii 1966), is misplaced. In that case the flood allegedly was caused by government negligence unconnected with any flood control project. Numerous decisions have held that Section 702c immunity does not extend to flood damage "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control * * *." *Peterson* v. *United States*, 367 F. 2d 271, 275 (9th Cir. 1966). See *Graci* v. *United States*, 456 F. 2d 20, 26-27 (5th Cir. 1971) (collecting cases), cert. denied, 412 U.S. 928 (1973). However, in this case, as we have noted (note 1, *supra*), the federal government was in fact engaged in flood control.

Furthermore, none of the cases cited by petitioners in their appendix (Pet. App. A-44) supports their contention that Section 702c immunity does not extend to floods caused by negligence. Indeed, the continued validity of several of the district court decisions relied upon by petitioners is questionable in light of more recent authority in the circuit courts. Compare *Guy F. Atkinson Co.* v. *Merritt, Chapman & Scott Corp.*, 126 F. Supp. 406 (N.D. Cal. 1954), and *Valley Cattle Co.* v. *United States*, *supra*, 258 F. Supp. at 16, 17, with *Aetna Ins. Co.* v. *United States*, *supra*, 628 F. 2d at 1201, 1204.

observed in *Aetna Ins. Co.* v. *United States, supra,* 628 F. 2d at 1204, since "[a]ny flood caused by government negligence is also caused in part by the natural conditions extant at the time of the negligence[,]" any attempt to distinguish between "man-made" and "natural" flooding would " 'lead the court into the morass of "contributing causes," "superseding causes," and "intervening causes." ' " *Ibid.*, quoting *Lunsford* v. *United States,* 570 F. 2d 221, 228 n.13 (8th Cir. 1977).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[3]Accordingly, there is no reason to follow petitioners' suggestion (Pet. 5-6) that the case be remanded to the district court for a factual determination of whether the flood here at issue was "man-made" or caused by climactic conditions.

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